

of one of causing death by a negligent act, an offence punishable under section 304A of the Penal Code and should have called the defence of the appellant on this amended charge.

The appellant's version of the accident was that just as he was about to overtake the stationary lorry, another lorry came from behind him at very great speed sounding its horn furiously in an endeavour to overtake his bus. Consequently he swerved to his nearside to allow this lorry to pass. When this other lorry passed him he swerved back to his offside in order to pass the stationary lorry but failed to clear it. The front nearside of his bus hit the stationary lorry. The learned district judge rejected the appellant's version of the accident because he found that the appellant was not speaking the truth. On the evidence before him he was in my opinion entitled to do so.

Having reviewed the whole evidence in this case, I am of the opinion that the appellant should have been convicted under section 304A of the Penal Code. I would therefore allow the appeal to the extent that the conviction is altered to one under section 304A of the Penal Code. As regards sentence I am of the view that a fine of \$1,000 or six months imprisonment would meet the ends of justice in this case. Accordingly the sentence of one year's imprisonment and the disqualification is set aside and a fine of \$1,000 or six months imprisonment in lieu thereof is substituted.

There is one other matter. Counsel for the appellant criticised the manner in which the learned district judge conducted the trial of the appellant. His complaint was that, by reason of the frequency and nature of the interruptions by the learned trial judge when the appellant was giving evidence, the appellant did not have a fair trial. It was alleged that the trial judge intervened on no less than fifteen occasions; that he cross-examined the appellant; that he made it known that he was displeased with the appellant; and that he was so thoroughly annoyed with the appellant that he gave vent to his feelings by imposing a severe sentence.

I have examined the trial judge's notes of evidence and they show that he did intervene on several occasions. On page 24 appears the following:—

"Witness takes a long pause. He leans over rails. He does not show respect to court. He does not even stand properly. When court warns him he takes it as if it was very funny, court orders him to behave. He asks interpreter to repeat question. He repeatedly smiles and bandies words with interpreter. Court can understand what he says in Hokkien. Court warns him to behave himself. Court directs interpreter to repeat question."

A And at page 28:—

"Witness deliberately evades answering question. Court warns him.

Court orders him to answer question."

B It is possible that some of the judge's observations when he intervened may have indicated to the appellant that the judge was not favourably disposed towards him, but I can find no trace whatever of any tendency on the part of the judge to take the side of the prosecution. It is quite plain that he was asking the accused to be mindful of decorum and in pressing the accused to answer questions he was endeavouring to ascertain the truth. Nevertheless it is desirable that district judges and magistrates should bear in mind that the first and most important thing for the administration of the criminal law is that it should appear that the accused is having a fair trial and that he should not be left with any sense of injustice and certainly not on the ground that the trial judge was prejudiced against him. Where the prosecution and the defence are both represented by counsel, as they were in this case, the trial judge should refrain from intervening unless it is absolutely necessary.

E Upon a full consideration of the case I have come to the conclusion that this is not a case where it can be said that the trial was completely irregular. I am unable to accept the argument that what took place would justify this court in ordering a retrial. As regards the sentence being severe, that should be the subject of an appeal as indeed it was in this case and has been dealt with.

Appeal allowed to the extent that the conviction was altered to one under section 304A of the Penal Code.

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**RE VALLIAPPA CHETTIAR, DECD.;
RAMANATHAN CHETTIAR v.
PALANIYAPPAN**

[F.C. (Azmi L.P., Gill F.J. and Lee Han Hoe J.) May 26, 1969]

H [Kuala Lumpur—Federal Court Civil Appeal No. X1 of 1968]

Executors and Administrators — Receiver — Application for appointment of — Application made ex parte — No evidence of interest in affidavit.

I *Practice and Procedure — Writ — Defendant permanently resident out of jurisdiction, but having local address — Whether writ to be issued out of jurisdiction — R.S.C. 1957, O. 3 r. 6 and O. 11.*

In this case the respondent who claimed to be the adopted son of the widow of the deceased and one of the beneficiaries of the estate brought an action against the appellant, the executor of the will of the deceased. In the writ of summons the address of the appellant was given as 38, Leboh Ampang, Kuala Lumpur, al-

though it was stated in the statement of claim that the appellant was permanently resident in India. On the application of the respondent made *ex parte* the court appointed an interim receiver. The appellant applied to court by way of motion: (a) for the order of appointment of an interim receiver to be set aside (b) for an order that the writ of summons and its service be set aside as being irregular. The learned judge dismissed the motion. On appeal to the Federal Court.

Held, allowing part of the appeal: (1) on the facts of this case no case had been made out where the High Court should appoint a receiver and therefore the order appointing the interim receiver should be set aside;

(2) there was no evidence of the appellant being directly interested in the property which was to be placed in the hands of the receiver and for this reason too, the motion for setting aside the order of receivership should be allowed;

(3) the writ in this case was not to be served out of jurisdiction and therefore not irregular.

Cases referred to:—

- (1) *Tullet v. Armstrong* (1836), 1 Keen 428; 48 E.R. 371.
- (2) *Bainbridge v. Blair* 4 L.J. Ch. 207.
- (3) *Taylor v. Eckersley* (1876), 2 Ch. D. 302.
- (4) *Lucas v. Harris* (1887), 18 Q.B.D. 134.

FEDERAL COURT.

Ronald Khoo for the appellant.

Dato' Athi Nahappan for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Kuala Lumpur by the defendant, the executor of the estate of one Valliappa Chettiar deceased.

The respondent/plaintiff in this suit issued a specially indorsed writ on 15th September, 1966 for the following orders:—

- (i) that a receiver be forthwith appointed for the estate of R.M.P.R.M.P. Valliappa Chettiar deceased;
- (ii) that the said defendant or his agent or servant do forthwith hand over to the said receiver the entire movable and immovable properties of the estate of the said deceased and/or that the said receiver shall forthwith take over the entire possession and control of the said estate and shall be responsible for the preservation and management of the said estate pending the decision of the court in India in respect of the validity or otherwise of the will purported to have been executed by the said deceased;
- (iii) that such receiver upon such decision by the court in India shall apply to this court for directions as regards the distribution of the estate of the said deceased;
- (iv) that such receiver shall produce or cause to be produced to this court a complete statement of affairs and accounts of the estate of the said deceased and such periodical accounts as may be directed by the court;
- (v) that pending the appointment and taking over the possession of the estate of the said deceased an injunction to restrain the defendant or his agent or servant from disposing of or otherwise dealing with the estate of the said deceased;
- (vi) costs;
- (vii) such further or other relief as is just.

A Subsequent to the issue of the writ, the respondent applied by summons in chambers on 19th September, 1966 and obtained an order for the appointment of one S.M. Meyappan as receiver in terms of prayer (i) of the statement of claim.

B On 26th September, 1966 the appellant filed a motion to have (a) the writ of summons and statement of claim filed in that suit, (b) the order of the court appointing the receiver and other consequential orders be set aside.

C The learned judge dismissed this motion on 21st December, 1967 and it is against this order that this appeal is brought before this court.

D It might be pointed out that the effect of the order of the court appointing Mr. S.M. Meyappan as the receiver would be to remove, though temporarily, the executor, to whom the High Court has granted probate and to replace him with Mr. Meyappan, a person chosen by the respondent himself.

Let me first set out the relevant facts of the case.

E Valliappa Chettiar deceased died in India on 25th December, 1959 leaving a will dated 7th October, 1957, under which he appointed the appellant as his sole executor and trustee and left his property in Malaysia absolutely to his only widow Muthukaruppi and his only daughter Meenakshi in equal parts.

F Probate was subsequently granted to the appellant at the High Court here and the grant was extracted in February, 1961. At the time of his death deceased left only these two ladies as his next-of-kin. The will was registered in 1960 in India.

G There were also legal proceedings before the Estate Abolition Tribunal at Tirunelvely in India under Originating Petition No. 14 of 1964 wherein the respondent adopted the will of the said deceased and consented to the grant of succession certificate to the appellant. Hostile proceedings, however, began in India in Originating Petition No. 6 of 1964, at the instance of other persons because an allegation was made in those proceedings for the first time that the will was a forgery. The respondent was not initially a party to those proceedings but later applied to be impleaded as a party to them. His application was, however, refused by the court and according to counsel for the appellant in the court below here, there was then a conflict of evidence as to whether the respondent had appealed against the decision.

I According to the respondent he was adopted by deceased's widow by virtue of an adoption deed dated 7th June, 1962. The validity of the adoption is still disputed by the

appellant for reason of non-registration in this country.

In his affidavit in support of his *ex parte* application for the appointment of a receiver, the respondent made the following allegations against the appellant:—

- (1) That the appellant had probated a forged will.
- (2) That the appellant had sold a land belonging to the deceased estate at a price below its market value and without previously obtaining a valuer's report to three purchasers one of whom was a close friend of his.
- (3) That the appellant attempted to dispose of other properties below their market value.
- (4) That the appellant disposed of property contrary to the direction in the will.
- (5) That the appellant had closed the money-lending business of the deceased here.
- (6) That the appellant is not resident in this country and only came here occasionally for the purpose of selling the properties belonging to the estate.
- (7) Notwithstanding the size of the properties here there is no agent or servant looking after them and his agent here had left for India in August 1966.
- (8) That the two beneficiaries were women who lived in India and now I quote the very words of the respondent from his affidavit:—

"The widow is an old woman and the defendant has been coercing, threatening, intimidating or using undue influence on both beneficiaries to let him do or deal with the said estate as he pleases. One of his usual threats is that if he is not allowed to do as he likes he would discard or desert his wife."

The respondent went on to say that if the appellant were allowed to administer the estate he would waste it to the detriment of the beneficiaries, and that whether or not the probated will was held valid by the Indian court it had become urgent and necessary for a receiver to be appointed for the preservation and management of the deceased's estate in Malaysia pending the decision in India and thereafter for directions by this honourable court for the distribution to each of the beneficiaries.

The affidavit went on to say that respondent's application was solely motivated by the desire to preserve and protect the estate for the beneficiaries, and that he was deeply concerned that if the equity of the court did not help the beneficiaries, the estate which he now had a share would be wasted and squandered away and it would be too late for him or other beneficiaries to preserve and protect the said estate.

The learned judge made the order as prayed and appointed one S.M. Meyappan as the receiver. Subsequently the respondent further applied to the court for direction that Meyappan sign a bond of \$5,000 in respect of his appointment as a receiver and that Meyappan was to be paid \$300 p.m. as remuneration for his

A services as a receiver. That was on 22nd September, 1966.

B On 26th September, 1966, the appellant entered a conditional appearance and applied to set aside the writ of summons by way of motion on the grounds that the writ of summons and the statement of claim filed therein were wholly irregular and that the order of the court pursuant to the summons in chambers be set aside for nullity or alternatively as being wholly irregular and that thirdly, pending the disposal of the application both the respondent and Meyappan the receiver, be restrained from acting upon or in any way in implementing the orders of the court made therein.

C On 7th October, 1966, the court made an order restraining the receiver from acting upon or in any way in implementing the orders of the court made on 19th and 22nd September, 1966 and that the appellant himself to deposit the key to the wooden box containing the key to the safe containing the effects of the estate of the deceased with the court and also to make an undertaking not to dispose or deal with any of the assets of the estate.

D The motion was heard on 10th November, 1966 and after reserving its judgment the court subsequently made an order dismissing the motion.

E In his judgment the learned judge set out the grounds upon which the respondent relied for his application for the appointment of a receiver. He did not deal with the objections that the writ and the statement of claim was nullity.

F There are altogether seven grounds of appeal against the judgment of the court.

G I propose to deal with the first two grounds only. The learned judge has, in my view, correctly stated the principle that a strong case must be established to induce the court to dispose of an executor who is willing to act and that the court should allow the appointment of a receiver only where there is danger of the property being damaged or dissipated by the executor. He cited *Tullet v. Armstrong* ⁽¹⁾ and *Bainbridge v. Blair*. ⁽²⁾ In *Taylor v. Eckersley* ⁽³⁾ in an action to enforce specific performance of a parole agreement to a bill of sale of personal chattels, upon an *ex parte* motion before appearance of a defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing an interim receiver for 14 days or until a receiver should be appointed under a reference in chambers for that purpose which another judge had directed. The plaintiff undertook to deal with the property only under direction of the court and to abide by any

order which the court might make as to damages etc. It will be seen that in that case the subject matter was personal chattels and the court was persuaded that there was immediate danger of the chattels in question being disposed of.

In *Lucas v. Harris*,⁽⁴⁾ Lindley L.J. said this:—

“And I notice the point only because *ex parte* application for a receiver ought not to be granted even after judgment except in case of emergency and it is desirable that this rule should always be borne in mind and not to be lightly departed from.”

The learned judge in the case before us in the final paragraph of his judgment says this:—

“The object of the plaintiff in the present motion is not to assert a right to the property in the possession of the executor but solely on the ground that the property should be well looked after so that when the time comes for distribution it would be a worthwhile process. He is interested to see that the property is properly managed. This is one of his grounds of claim. He thinks an executor who is a foreign citizen and permanently outside the jurisdiction is not a suitable person to fully and properly manage the estate. He was also of the view that occasional visits by an agent in Singapore to supervise the estate is not good enough. I am of the view that this is a strong ground. The estate is in this country and there must be someone within the jurisdiction to manage the estate. If there is none, there is a possible danger of the property going down the drain. This view is based upon consideration of convenience and expediency.”

The question, in my view we have to consider is whether the respondent had really established a strong case by his affidavit that the trustee had or would dissipate the estate.

The allegation against the appellant was that under the purported will the appellant was not empowered to dispose or sell any of the landed properties of the said deceased, and that contrary to the direction of the said will the appellant had sold a valuable rubber estate at a price below the market price to three buyers one of whom was an intimate friend of his. The affidavit does not, however, state what was the price of the land at which it was sold and what was the market price of the land at that time. Apart from that I think it is convenient to state that under Order 38 r. 3 affidavits should be confined to such facts as the witness is able of his own knowledge to prove. In my view, therefore the allegation that the price of the estate was below market price should be sworn to by a person who of his personal knowledge knew of the conditions of the rubber estate and was an expert valuer.

The next allegation is that the appellant has also been attempting to sell other valuable properties of the estate and that the respondent had frustrated these attempts in lodging caveats on the properties. If all the respondent wished is that the property should be preserved pend-

A ing the disposal of his claim surely this can be done by an order of court restraining the appellant from disposing of the land without permission of the court or on certain conditions. There is of course, also allegation of mismanagement or incompetent management. In my view further evidence would be essential to prove that there has been incompetent management. I do not consider that the court should act on a mere allegation that the estate has been incompetently managed. As to the allegation that there is nobody to look after the estate, there is evidence sworn by the appellant that he had an agent named A.M.N. Nagappa Chettiar resident here. In my view, therefore, this is not a case where the High Court should have appointed a receiver and much less to have done so *ex parte*.

B I would therefore allow the appeal on these grounds.

D I would therefore set aside the order of the court appointing the interim receiver.

E In reference to the prayer (a) in the appellant's motion, to have the writ of summons and the statement of claim set aside, I had the opportunity of reading the judgment of my brother Gill F.J. and I wish to say that I agree with what is stated in his judgment and that that ground of appeal be dismissed.

In the circumstances, we consider the appellant should get half of his costs and the deposit of \$500 be returned to him.

F Gill F.J.: I agree with the Lord President that this appeal should be allowed on the grounds stated by him and that the order of the High Court dated 19th September, 1966 appointing one S.M. Meyappan as interim receiver of the estate of R.M.P.R.M.P. Valliappa Chettiar deceased be set aside.

G The deceased died in India on 25th December, 1959 leaving a will dated 7th October, 1957 under which he appointed the defendant-appellant as his sole executor and trustee and left all his property in Malaysia to his only widow Muthukaruppi and his only daughter Meenakshi, who is married to the executor, in equal shares. H The will was registered in India in 1960 and a grant of probate was issued to the defendant by the High Court here in February, 1961. The widow adopted the plaintiff-respondent as her son by an adoption deed dated 7th June, 1962 executed in India.

I The order of receivership was made on an *ex parte* application by the plaintiff who claimed that he being the adopted son of the deceased was one of the beneficiaries of the said estate. His main ground for the application was that the defendant as the executor and trustee of the estate had disposed of a valuable rubber

estate belonging to the estate, and had also been attempting to sell other valuable landed properties of the estate when he was not empowered under the will to dispose of any such properties.

The basis on which the order was made was that the plaintiff being an adopted son of the widow had an interest in the property to which she was entitled under her husband's will, unless she disposed of it during her life time. In other words, the order was not made on the basis that the plaintiff was a direct beneficiary of the estate. The widow, far from supporting the plaintiff's claim to receivership, supported the defendant's motion to have the appointment of the receiver set aside. There was thus no evidence of the plaintiff being directly interested in the property which was to be placed in the hands of the receiver. In those circumstances, the motion for setting aside the order of receivership should have been granted.

It may well be that the effect of the plaintiff's adoption by the widow was to make him the adopted son of the deceased, thereby making him a beneficiary of the deceased's estate, but the order for the appointment of a receiver was clearly not made on that ground. It is true, as the learned judge said in his grounds of judgment dismissing the motion, that the adoption of the plaintiff was never disputed, but the effect of that adoption was very much in dispute. The rights which the plaintiff acquired under the alleged adoption, if any, will be a matter to be decided when the suit comes up for trial, but, in the meantime, no strong case has been made out to induce the court to dispose of the executor who was willing to act.

By his notice of motion asking for the order of receivership to be set aside, the defendant also asked for an order that the writ of summons which was specially endorsed with a statement of the plaintiff's claim be set aside as being wholly irregular. This part of the motion was not dealt with by the learned judge. The motion to set aside the writ was made on two grounds, first, that it was issued contrary to the provisions of rule 4 of Order 2 of the Rules of the Supreme Court, 1957 which provides that "no writ of summons for service out of the jurisdiction, or of which notice is to be given out of jurisdiction, shall be issued without the leave of the court or a judge", and, secondly, that inasmuch as the plaintiff's claim was based on an allegation of fact, it could not be specially endorsed with or accompanied by a statement of claim by reason of the provisions of Order 3, rule 6(1) of the said Rules.

In my judgment, no case had been made out by the defendant for the writ to be set aside. The address of the defendant stated in

A in the writ was "38 Leboh Ampang, Kuala Lumpur", and, although it was said in the statement of claim endorsed on the writ that the defendant is a permanent resident in and a citizen of India, it was also said that the defendant occasionally visited Malaysia for a short period mainly for the purpose of selling or attempting to dispose of the properties of the said estate in Malaysia.

B It is to be observed that a writ may be issued against a defendant with a foreign address where it is not intended to serve it out of the jurisdiction, e.g., where the defendant has a solicitor within the jurisdiction who will accept service and undertake to appear for the defendant. The form of writ is that for service within the jurisdiction, and on being issued is stamped with the seal: "Not for service out of the jurisdiction." If subsequently it should become necessary to serve the writ out of the jurisdiction, application can be made in the usual way under O. 11 for leave to issue a concurrent writ and serve it, or notice of it, out of the jurisdiction.

C There were also no allegations of fraud against the defendant, apart from the allegation that he had sold and was attempting to sell landed properties of the estate without being empowered to do so under the will. There were allegations about the defendant having sold some lands below market value but they were vague and contained no specific details.

D I would therefore dismiss the appeal in so far as it seeks to have the writ set aside.

E After hearing further arguments it is ordered that the appellant do have half the costs of this appeal and that the deposit made by him towards costs be paid out to him.

F Lee Hun Hoe J.: I have the advantage of reading the judgments of the Lord President and Gill F.J. I agree that the appeal should be allowed for reasons given by the Lord President. I also agree that the appeal seeking to set aside the writ of summons should be dismissed.

G The respondent/plaintiff successfully obtained an order of receivership on an *ex parte* application. By paragraph 1 of his statement of claim he claims to be an adopted son of the deceased and therefore one of the beneficiaries. He was adopted by the widow in India some 2½ years after the death of deceased and an adoption deed was said to have been executed on 7th June, 1962. I fail to see how he can claim to be the adopted son of the deceased and how such adoption can have retrospective effect.

H By his will the deceased left all his property in Malaysia in equal shares to his widow Muthukaruppi and his only daughter Meenakshi

who is the wife of appellant/defendant. Until the executor distributes the property the widow and the daughter merely have equitable interests. Any right or interest which the respondent/plaintiff may acquire, as a result of his adoption, will have to be determined at the proper time. To do so he will have to establish that his adoption by the widow in India is valid in this country. Further, if the adoption is valid, he will have to establish that the adoption can have retrospective effect to make him the adopted son of the deceased.

I am doubtful if the application for the appointment of a receiver can be made by an *ex parte* summons in the absence of special circumstances. The writ of summons is not one to be served outside the jurisdiction. The Kuala Lumpur address of the appellant/defendant is given. *Halsbury's Law of England*, 3rd edition, Volume 32, page 391, paragraph 627 under the heading of "Notice of Application" states:—

"After service of the writ of summons, notice should be given, if possible, to the defendant of any intended application for a receiver. A receiver is not appointed on an *ex parte* motion, either before or after appearance, in the absence of special circumstances; and *ex parte* applications for the appointment of a receiver by way of equitable execution are not granted, except in cases of special emergency. Though a defendant has not appeared, an attempt should still be made to serve him personally with notice of any motion or summons for a receiver. It is not enough to file documents in the Central Office of the High Court as in default of appearance."

No attempt was made to serve the notice on the appellant/defendant. Special circumstances have not been shown to exist. For myself I consider that the learned judge should have granted the motion to set aside his earlier order as the appellant/defendant was denied any hearing.

Appeal partly allowed.

Solicitors: *Shearn Delamore & Co.; Athi Nahappan & Co.*

LEE CHAU v. PUBLIC INSURANCE CO. LTD.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill and Ali FJJ.)
 July 21, 1969]

[Ipoh — Federal Court Civil Appeal No. X.25 of 1969]

Insurance — Third party claim — Settlement before judgment — Claim for reimbursement from insured on ground of breach of terms of policy — Road Traffic Ordinance, 1958, s. 80.

Road Traffic — Insurance — Duty of insurers to satisfy third party claim — Settlement before judgment — Road Traffic Ordinance, 1958, s. 80.

This was an appeal against the decision of the High Court reported *ante* p. 10.

A The respondents were motor insurers. In settlement of a claim by a third party against their insured, they paid a sum of \$5,500 to the third party before any judgment was obtained by the latter against their insured. The respondents brought an action against the insured for the reimbursement of the sum paid to the third party on the ground that the insured had committed a breach of the terms of the policy of insurance which would have entitled them to repudiate liability. The claim was based on the term in the policy which provided that the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the Road Traffic Ordinance.

B Held, allowing the appeal: (1) the insurers' statutory liability towards third parties under the Road Traffic Ordinance is limited by conditions laid down in section 80, one of which is that the payment is in respect of a judgment;

C (2) under the terms of the policy of insurance, the respondents' right to reimbursement did not arise unless payment was made in discharge of their statutory liability. The payment by the respondents to the third party was made before any judgment was obtained against the insured. The respondents were therefore not entitled to be reimbursed for such payment.

D Cases referred to:—

(1) *Gan Chwee Leong v. New India Assurance Co. Ltd.* [1968] 1 M.L.J. 196.

(2) *Beacon Insurance Co. Ltd. v. Langdale* [1939] 4 All E.R. 204.

E FEDERAL COURT.

W.S.W. Davidson for the appellant.

Peh Swee Chin for the respondents.

Ong Hock Thye C.J. (Malaya) (delivering the judgment of the court): Where motor insurers, in discharge of a compulsorily insurable liability, have settled a claim before judgment is obtained against their insured by a third party, and the insured had been in breach of a condition of the policy requiring him as soon as possible to notify the insurers of any occurrence which may give rise to a claim, is the insured bound to repay to the insurers any sum so paid to the third party?

G This question was answered in the affirmative by the High Court at Ipoh, allowing a claim by the respondents for \$5,500 and costs. The judgment was reversed by us on appeal and we now give the grounds of our decision.

H Purporting to follow *Gan Chwee Leong v. New India Assurance Co. Ltd.*⁽¹⁾ the learned trial judge held that, the law being clear as to the insurers' right to take over the proceedings or negotiations from the insured, the insurers were entitled, in the common interest of themselves and their insured, to pay off the third party whose claim they reasonably considered incontestable. Since he found as a fact that the appellant had failed within a reasonable time to give notice of the accident to the respondents and was thereby in breach of a condition of the policy, it appeared to him that "the